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IN THE

Supreme Court of The United States

October Term, 1966

No. 45

RONALD R. CICHOS,

Petitioner,

v.

STATE OF INDIANA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF INDIANA

BRIEF FOR THE PETITIONER

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OPINIONS BELOW

The opinion of the Supreme Court of Indiana entered on July 6, 1965 is reported at 208 N. E. 2d 685, and is, as yet, unreported in the official Indiana Reports. The opinion

on rehearing rendered October 1, 1965, also officially unreported, is found in 210 N. E. 2d 363.

JURISDICTION

The judgment of the Supreme Court of Indiana was made and entered on July 6, 1965. A copy of such was appended to Petitioner's Appendix to the Petition for Writ of Certiorari at page 1 and has been printed as a part of the Record in this cause. The petition for rehearing was denied with an opinion by the Supreme Court of Indiana on October 1, 1965. It was also appended to the Petitioner's Appendix at page 8 and has aso been printed as a part of the Record. The Petition for Writ of Certiorari was filed December 27, 1965 with the Cerk of the Supreme Court of the United States. On April 4, 1966, this Court issued an order granting the petition for writ of certiorari and placing the same on the summary calendar. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth and Fourteenth Amendments to the Constitution of the United States involved in this appeal and Burns' Indiana Statutes Ann. Sec. 9-1901, 9-1902 are set forth in the Appendix hereto at pp. 2 and 3. The statutes under which Petitioner was charged, Burns' Ind. Stat. Ann. Sec. 47-2001(a) and Sec. 10-3405 are also set forth in the Appendix at p. 3.

QUESTIONS PRESENTED

The instant case presents the question as to whether the Constitutional protection against double jeopardy as guaranteed by the Fifth Amendment is of such basic characteristic in the law as to be immune from state encroachment

under the Fourteenth Amendment and whether such protection precludes retrial on a second charge for which an accused has been acquitted, after a successful appeal of a first charge.

STATEMENT

This criminal action was brought against Petitioner upon a second amended affidavit, charging the offense of involuntary manslaughter, Burns' Ind. Stat. Ann. Sec. 10-3405 and reckless homicide, Burns' Ind. Stat. Ann. Sec. 47-2001(a). The cause was tried by jury and a verdict of guilty returned as to reckless homicide. The jury was silent as to a verdict on the charge of invountary manslaughter. Petitioner successfully appealed his conviction to the Indiana Supreme Court and the cause was reversed and a new trial ordered. A copy of the Opinion of the Indiana Supreme Court is attached hereto in the Appendix at page 4. At the second trial Petitioner was not only recharged with the crime of reckless homicide, in Count 1 but also again charged with the crime of involuntary manslaughter in Count 2. (Tr. pp. 14, 15.)

Petitioner filed a special plea of former jeopardy under the Indiana and the United States Constitutions addressed to Count 2, the pertinent parts of which are as follows:

> "Comes now the defendant, Ronald Richard Cichos, by his counsel, Warren Buchanan and John B. McFaddin, and for an additional special plea herein, alleges and says:
>
> "1. That on November 6, 1958, a second amended affidavit in this cause was filed in the Parke Circuit Court; that in said second amended affidavit this defendant was charged in two counts with the statutory offenses of reckless homicide, by count 1 thereof, and involuntary manslaughter, by count 2 of said second amended affidavit; that a bench warrant was issued by the Parke

Circuit Court for the arrest of said defendant on said charges; that this defendant was thereupon arrested and held to answer to said charges; that a copy of the second amended affidavit herein charging this defendant with such offenses, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit 'A.'

"2. That by its terms, said second amended affidavit charged that this defendant on September 28, 1958, in Parke County, Indiana, committed the offenses of reckless homicide and involuntary manslaughter by then and there, unlawfully and feloniously, operating a motor vehicle upon and along a high way at and in the County of Parke, in the State of Indiana, while under the influence of intoxicating liquor, and that the said defendant then and there drove and operated his said automobile into and against an automobile then and there driven and operated on said highway and in and on which one Frank Glen Barber and Shella Mae Barber were then and there riding and that the said Frank Barber and Shella Mae Barber were injured and wounded as a result of such collision and that they died as a result thereof on September 28, 1958.

"3. That the defendant was arraigned in the Parke Circuit Court, before the judge thereof, on November 24, 1958, and entered a plea of not guilty to the charges of reckless homicide and involuntary manslaughter as contained in said second amended affidavit.

"4. That during the months of November and December, 1959, this cause was tried in the Parke Circuit Court, and that the jury, at the trial of said cause, returned a verdict finding the defendant guilty of reckless homicide, as charged in said second amended affidavit; that the jury, at the trial of said cause, did not return a verdict finding the defendant guilty of involuntary manslaughter, as charged in count 2 of the second amended affidavit herein; that the Court

rendered judgment of conviction and sentence on the verdict in this cause on February 16, 1960; that the defendant filed a motion for a new trial in said cause, and that said motion was over-ruled by the Court; that on August 12, 1960, and within the time granted by the Supreme Court of Indiana for such purpose, the defendant filed a transcript of the record and assignment of errors on an appeal of said conviction to said Supreme Court of Indiana; that on July 2, 1962, the Supreme Court of Indiana reversed the judgment of conviction of the defendant and this cause was remanded to this Court with instructions to sustain defendant's motion for new trial; that this cause is now assigned for re-trial in this Court for June 13, 1963; that a copy of the verdict returned by the jury herein finding the defendant guilty only of the offense of reckless homicide, certified as true and correct by the Clerk of this Court, is attached hereto, made a part hereof and marked Exhibit 'B.'

"5. That the defendant is now charged with the Statutory offenses of reckless homicide and involuntary manslaughter, as charged in counts 1 and 2, respectively, of the second amended affidavit herein; that the jury in the original trial of this cause, by failing to return a verdict as to the second count of the second amended affidavit herein, by implication, acquitted the said defendant of the charge of involuntary manslaughter.

"6. That the prior prosecution and acquittal of the defendant on the charge of involuntary manslaughter would now bar any further prosecution of said defendant based upon the same crime.

7. That the facts necessary to convict the defendant on count 2 of the second amended affidavit now pending in this Court were adjudicated by the failure of the jury at the prior trial of the same to return a verdict on said count, thus acquitting said defendant of said crime; that the defendant cannot be placed in jeopardy,

the second time, for the same offense; that prosecution to a final judgment of the offense in the prior trial of the same is a bar to his prosecution as to the second count of the second amended affidavit now pending in this Court.

"WHEREFORE, the Defendant prays that the charge of involuntary manslaughter as set forth in the second count of the second amended affidavit now pending against him be dismissed.

RONALD RICHARD CICHOS, Defendant
BY: Warren Buchanan
John B. McFaddin (wa)
His Attorneys

STATE OF MEXICO)
)SS:
COUNTY OF QUAY)

RONALD RICHARD CICHOS, after being first duly sworn upon his oath, says:

That he is the defendant in the above entitled cause of action and that the facts stated in the foregoing VERIFIED SPECIAL PLEA OF FORMER JEOPARDY are true in substance and in fact.

Ronald Richard Cichos
(Ronald Richard Cichos)

SUBSCRIBED and SWORN to before me this 31 day of MAY, 1963.

Opal Skelton
NOTARY PUBLIC

(SEAL)

My Commission expires:
Dec. 29, 1964 (Tr. pp. 11-13)

The trial Court sustained a demurrer to this special plea.

(R. p. 99) Petitioner moved for directed verdicts upon this count because of former jeopardy both at the conclusion of the State's evidence and at the conclusion of all of the evidence. The pertinent parts here are as follows:

> "Comes now the defendant by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of the prosecution's case in chief and after the prosecution has rested and before the introduction of evidence in support of the defendant's defense and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose, for the following reasons and for each of said reasons, separately and severally considered, to-wit:
>
> • • • • •
>
> "5. The defendant at the original trial of this case was acquitted and, by implication, found not guilty of involuntary manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in Count II of the 2nd Amended Affidavit."
>
> (Tr. pp. 21-22)

• • • • •

and

> "Comes now the defendant by his attorneys, Warren Buchanan and John B. McFaddin, at the conclusion of all the evidence in the case, and before argument and before the Court has instructed the jury and moves the Court to forthwith direct a verdict herein for the defendant and to discharge the defendant from custody, and tenders and offers an instruction for such purpose,

for the following reasons and for each of said reasons, separately and severally considered, to-wit:

• • • • •

"The defendant at the original trial of this cause was acquitted and, by implication, found not guilty of Involuntary Manslaughter, as charged in Count II of the 2nd Amended Affidavit. The defendant cannot be tried more than one time for the same offense. Therefore, in the present trial, the jury should be directed to return a verdict finding the defendant not guilty of the offense of Involuntary Manslaughter charged in County II of the 2nd Amended Affidavit."

(Tr. pp. 25-26)

Both were overruled. Verdict was returned finding defendant guilty of Reckless Homicide. Motion in Arrest of Judgment, again presenting the question of Multiple Jeopardy was filed by Petitioner. (Tr. pp. 30-32) Again such was overruled. Again, Petitioner was found guilty of reckless homicide. His Motion for New Trial promptly filed was overruled. The part of such Motion addressed to the jeopardy question is as follows:

"2. Irregularities in the proceedings of the Court, or jury, and orders the Court and abuse of discretion by which the defendant was prevented from having a fair trial in this, to-wit:

"The Court erred in sustaining the demurrer of the State of Indiana to the defendant's verified special plea of former jeopardy addressed to the charge against the defendant of the offense of involuntary manslaughter as set forth in the second count of the second amended affidavit upon which the defendant was tried in this cause."

(Tr. pp. 32-33)

• • • • •

"6. Error of law occurring at the trial in this, to-wit:

The Court erred in overruling defendant's motion, at the conclusion of evidence presented by the State of Indiana, and after the State of Indiana had rested its case, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said tendered instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

Instruction No. 4

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offenses charged in the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

"7. Error of law occurring at the trial in this, to-wit: The Court erred in overruling defendant's motion, after the State of Indiana and the defendant had rested, and after the introduction of all of the evidence in this cause had been completed, and before argument of counsel, that the jury be forthwith directed to return a verdict herein finding the said defendant not guilty of the offenses charged in the 2nd amended affidavit in this cause, and in refusing to give the jury an instruction then and there tendered to the Court by the defendant for such purpose, which said instruction was as follows:

INSTRUCTION DIRECTING JURY TO RETURN VERDICT FOR DEFENDANT TENDERED WITH DEFENDANT'S WRITTEN MOTION FOR SUCH PURPOSE.

Instruction No. B

Members of the jury you are directed to immediately and forthwith return a verdict finding the defendant not guilty of the offense charged in County II of the 2nd Amended Affidavit in this cause.

JUDGE, THE PARKE CIRCUIT COURT

(Tr. p. 38)

On appeal to the Supreme Court of Indiana Petitioner assigned as error the overruling of his motion for new trial and the Court (Tr. p. 48) deciding the case on its merits, held that former jeopardy although existing in this case had been waived by Petitioner's first appeal and that a second trial even as to the involuntary manslaughter was permissible without violation of the double jeopardy provisions of the Indiana Constitution because of such waiver. The Supreme Court of Indiana further held that no Federal question under the Fourteenth Amendment of the Constitution of the United States was involved and no protection under that Amendment afforded to state action regarding *double* jeopardy. Upon re-hearing, the Indiana Supreme Court affirmed its earlier holding. Its language concerning the Federal question under the Fourteenth Amendment reads as follows:

> "Three: Appellant finally contends that retrial under both counts of the indictment constituted double jeopardy as prohibited by the Fifth Amendment and the due process clause of the Fourteenth Amendment to the U. S. Constitution.

"Appellant asserts that, despite the established Indiana law on this issue, a change in Indiana Law is compelled by *Green* v. *United States* (1957), 355 U. S. 184, 2 L. Ed. 2d 199. However, among other facts which must be considered in relation to this assertion is the fact that the Green case was a federal case and therefore the rule enunciated arose under the U. S. Supreme Court's supervisory power over federal courts. The Green case involved a retrial on a murder charge, and resulted in a verdict of guilty of first degree murder, after a prior trial which had resulted in a second degree murder conviction had been reversed on appeal. Applying the Fifth Amendment double jeopardy provision, the Supreme Court held that a conviction of a lesser included offense amounted to an acquittal of the greater offense. Consequently, they reasoned that, on retrial, the accused could be tried for no greater charge than that for which he was originally convicted.

"Aside from the obvious fact that the Green case, *supra,* involved the application of federal law and federal standards, there is the distinction concerning the character of the charges twice in issue. The offenses here involved are statutorily treated more as one offense with different penalties rather than viewing reckless homicide as an included offense in involutary manslaughter.

"Since the elements of both counts are almost identical it is recognized that a verdict of guilty of reckless homicide does not logically exclude the possibility of such a verdict on the charge of involuntary manslaughter for constitutional reasons as would be the case when a conviction is had on a lesser included offense. See Burns' Ind. Stat. Ann. Sec. 47-2002 (1956 Repl.).

"When dealing with such interconnected offenses it is almost futile to attempt to sort out error and reverse a case only as to those errors which affected the defendant. Recognizing this futility, this state has accepted the position adopted by a substantial number

of states, that when a defendant initiates an appeal asking for a new trial and the appeal disclosed error, the original trial is treated as a total nullity, leaving the parties as they were prior to the proceeding tainted with error. Burns' Ind. Stat. Anno. Sec. 9-1902 (1956 Repl.). Compare: *Green* v. *United States, supra.* 355 U.S. 184, 216 n. 4; 2 L. Ed. 2d 199, 220 n. 4 (dissenting opinion).

"The protection against double jeopardy has never specifically been incorporated within the scope of the due process clause of the 14th Amendment, *supra,* by the Supreme Court. Arguable, double jeopardy provision is not necessarily a hallmark of either system, and it is reasonable to assume that some limitation on the total incorporation of the Fifth Amendment within the due process clause of the 14th Amendment may still exist.

"In view of the diverse reasoning by many of the states concerning double jeopardy in situations similar to the instant case, it does not appear that the federal standard of double jeopardy in *Green v. United States, supra.* can be deemed so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine, which interpretations of their own constitutions are primarily the prerogative of the states."

SUMMARY OF ARGUMENT

The basic and fundamental nature of the right against double jeopardy has always *at some point* been embraced within constitutional due process. Thus, necessarily a state has always been limited in its refusal to recognize or apply the protection from double jeopardy.

The creation of multiple statutory offenses for the same qualitative act is, in itself, an encroachment upon this guarantee. When, as here, a defendant is tried in this manner, is legally acquitted of one of such charges and

successfully appeals his conviction of the other, but is then subjected to a *second* trial on both of such counts, the point of constitutional due process has been reached.

A criminal defendant is not constitutionally required to waive the basic guarantee against former jeopardy by his selection to appeal an improper conviction. Furthermore, if such an appeal is successful, a defendant should not be compelled to again stand trial on a charge upon which he had been acquitted. If *Palko* v. *Connecticut,* 302 U. S. 319 (1937) sanctions such a result, it is certainly repugnant to basic tenets of ordered liberty and should be overruled. To subject a criminal defendant to the dilemma of choosing between accepting an improper conviction and a retrial on issues where has has once been tried but not convicted, is inherently unfair and violative of due process.

The fact that Petitioner is acquitted a second time on a count in no way mitigates against the effect of the recharge and retrial of such count. Certainly the unfairness of prosecution leverage in such a retrial to gain a conviction on a different count is necessarily present. Any contention of "mootness" is therefore not relevant to the practicalities of such a retrial.

Historically and conceptually the guarantee against dual jeopardy is significant in the Anglo-American system of jurisprudence. It is of such significance that logic alone calls for its inclusion within the framework of due process. The guarantee against double jeopardy presents the totality of many protections. To deny its absorption within due process would necessarily be to drain the vitality from many other constitutional guarantees such as self incrimination, unreasonable search and seizure and even the right to counsel. Those protections are necessarily relegated to a less important position if successive trials, even highly protective ones, are permissible until conviction results.

ARGUMENT

The instant case concerns itself with a facet of the absorption process of various constitutional rights found in the first ten Amendments to The United States Constitution within the ambit of the Fourteenth Amendment. The particular concern is with the "double jeopardy" protection contained in the Fifth Amendment.

Petitioner in this case was originally charged with violation of Burns' Ind. Stat. Ann. Sec. 47-2001(a) defining the offense of reckless homicide as follows:

> "Reckless Homicide. Any person who drives a vehicle with reckless disregard for the safety of others and thereby causes the death of another persons shall be guilty of the offense of reckless homicide. Any person convicted of reckless homicide shall be punished by a fine of not less than one hundred dollars ($100) or more than one thousand dollars ($1,000), or by imprisonment in the state farm for a determinate period of not less than sixty (60) days and not more than six (6) months, or by both such fine and such imprisonment, or by a fine of not more than one thousand dollars ($1,000) and imprisonment in the state prison for an indeterminate period of not less than one (1) year or more than five (5) years"

and has been also charged with violation of Burns' Ind. Stat. Ann. Sec. 10-3405 which defines the crime of involuntary manslaughter as follows:

> "Whoever voluntarily kills any human being without malice, expressed or implied, in a sudden heat, or involuntarily in the commission of some unlawful act is guilty of manslaughter, and on conviction shall be imprisoned not less than two (2) years nor more than twenty-one (21) years."

Two amendments were made and Petitioner subsequently stood trial on both of the above charges. It may be noted that an Indiana Statute, Burns' Ind. Stat. Ann., Sec. 47-2002(1), permits joinder of the above charges but recognizes the jeopardy and collateral estoppel features of the offenses by providing for sentencing only as to one such offense and providing further that an adjudication of one bars prosecution of the other.

Rogers v. *State,* 227 Ind. 709, 88 N. E. 2d 755 (1949); *State* v. *Beckman,* 219 Ind. 176, 37 N. E. 2d 531 (1941).

That statute is as follows:

"(1) Each of the three (3) offenses defined in this section is a distinct offense. No one of them includes another, or is included in another one of them. Section 52, subsection (a) Sec. 47-27001(a), in creating the offense of reckless homicide, does not modify, amend or repeal any existing law, but is supplementary thereto and to the other sections of this act. All three (3) of the offenses, or any two (2) of them, may be joined in separate counts in the same indictment or affidavit. One (1) or more of them may be joined in separate counts with other counts alleging offenses not defined in this section, such as involuntary manslaughter, if the same act, transaction or occurrence was the basis for each of the offenses alleged. With respect to the offenses of reckless homicide and involuntary manslaughter, a final judgment of conviction of one (1) of them shall be a bar to a prosecution for the other; or if they are joined in separate counts of the same indictment or affidavit, and if there is a conviction for both offenses, a penalty shall be imposed for one (1) offense only."

The Respondent, State of Indiana, has acknowledged the fact that the two offenses are qualitatively identical. (Respondent's brief on Petition for Certiorari, pp. 11, 12.)

The first trial resulted in a conviction as to the charge of reckless homicide and jury silence as to the charge of involuntary manslaughter. Petitioner successfully appealed his conviction of reckless homicide to the Indiana Supreme Court and a new trial was subsequently granted. The opinion of the Supreme Court is reported at 243 Ind. 187 and at 184 N. E. 2d 1 and is included in the appendix to this brief. The new trial, however, was held over Petitioner's vigorous objections on both charges, i.e., reckless homicide and involuntary manslaughter. Thus Petitioner was again tried for both reckless homicide and involuntary manslaughter although the jury had acquitted him of the latter by its failure to return any finding on the latter charge.

Anderson v. *State*, — Ind. —, 214 N. E. 2d 169 (1966).

The Indiana Supreme Court, on appeal held that Petitioner could be twice charged with involuntary manslaughter as well as reckless homicide. That Court further held that no federally protected right was involved for the reason that "double jeopardy . . . is not necessarily a hallmark of either system . . ." and such is not "so fundamental a concept of ordered liberty as to compel a total revision of state interpretations of the doctrine . . . ."

The rationale was based on a theory that a criminal defendant waives the right not to be twice tried for the same offense by perfecting an appeal. This, according to the Indiana Supreme Court, permits a retrial not only on the counts for which a defendant was convicted, but, in addition, all counts involved in the original trial *even if the defendant has been legally acquitted of such.*

Application of any of the Bill of Right's protections to the various States through the Fourteenth Amendment has necessarily involved determination of certain preliminary

factors. Thus initial determination as to the legal and factual existence of self-incriminatory procedures was necessary before the constitutional question of "absorption" was reached.

Malloy v. *Hogan*, 378 U. S. 1 (1964).

Similarly, protection of the right to counsel as established in *Gideon* v. *Wainright*, 372 U. S. 335 (1963) and *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), was afforded only after denial of that right at a particular state of the incriminatory proceedings was factually established. The unreasonableness of a search and seizure and when and by whom made are thus preliminary factors which may or may not trigger the absorption of appropriate protection for an accused.

Mapp v. *Ohio*, 367 U. S. 643 (1962).

The related doctrine of double jeopardy is equally concerned with certain basic preliminary determinations. Once these are found to exist, that doctrine possesses all of the historical and rational basis for absorption as found in any of the above doctrines with which it has great affinity. In this case, however, there is no dispute as to the existence of former jeopardy; rather the dispute goes only to the qualitative measure of one's protection against it!

In previous considerations of the applicability of the Fourteenth Amendment to double jeopardy cases much of the concern has apparently centered on determinations as to whether double jeopardy did in fact exist. Thus in *Abbate* v. *United States*, 359 U. S. 187 (1959) this Court held that trial in federal courts to vindicate federal law was not precluded by a prior state proceeding under state law for the same criminal act. The corollary of this rule

occurred in *Bartkus* v. *Illinois*, 359 U. S. 121 (1959) holding a subsequent state proceeding not to be barred by a prior federal action for the same criminal act. The dual sovereignty system in the United States is such that neither sovereign may, by its action, preclude enforcement of the criminal laws of the other. Enforcement of criminal sanctions are, according to this concept, a part of the essence of sovereignty and protection of the interest of each sovereign as enumerated in its statutes is equally the essence of federalism. Thus prosecution by separate sovereigns to enforce separate statutes is *actually not double jeopardy.* (At least when viewed from the point of view of the prosecution.) Arguably then neither *Bartkus or Abbate* were as concerned with absorption of "double jeopardy" into the Fourteenth Amendment as they were with the preliminary issue as to whether or not dual jeopardy in the Constitutional sense in fact existed. Of importance here is the fact that relief to Petitioner does not depend upon the overruling of either *Bartkus* or *Abbate.* In this case there is no doubt but that jeopardy twice attached by the *same sovereign* for the *same identical offense* (involuntary manslaughter). In fact when viewing the qualitative aspects of the multiple offenses, it is clear that actually Petitioner was subjected to four separate charges at two trials for essentially the same offense.[1]

Far removed from the dual sovereignty policy considerations decided in *Abbate* and *Bartkus,* this cause concerns itself with aspects of admitted jeopardy.

---

[1] It is conceded that reckless homicide and involuntary manslaughter possess identical elements in regard to motor vehicle deaths. Petitioner stood trial on *four* counts at *two* trials for identical qualitative offenses.

I. THE PROTECTION AGAINST DOUBLE JEOPARDY IS OF SUCH FUNDAMENTAL NATURE AS TO CONSTITUTE A FOURTEENTH AMENDMENT PROTECTION AT LEAST UNDER THE CIRCUMSTANCES OF THE CASE AT BAR.

The importance of the protection against double jeopardy is well illustrated by the historical prominence which it has occupied in our Anglo-American jurisprudence. This has been ably articulated in the dissent of Justice Black in *Bartkus* v. *Illinois*, 359 U. S. 121, 150 (1959).

See also:

70 *Dickinson Law Review* 377 (1966);

Sigler, *History of Double Jeopardy, American Journal of Legal History*, vol. 7, p. 283 (1963).

The motivations upon which this majestic history is based are indeed many. The principles of both *res judicata* and of collateral estoppel give practical logic to the defense of double jeopardy.

Restatement, Judgments Sec. 62 Comment f.

In addition to the finality of judgments and the public convenience policy considerations, several more fundamental concerns make this right of utmost importance. The tremendous resources of the prosecution, the social stigma attached to the defense of a criminal charge, the threat of one's freedom and the realization that should a state be permitted an issue before enough juries, conviction is almost certain are compelling reasons for regarding double jeopardy among the class of man's most fundamental rights.

Green v. *United States*, 355 U. S. 184 (1957);

United States v. *Wilkins*, 348 F. 2d 844, 849 (1966); 70 Dickinson Law Review 382 (1966) *supra*.

As discussed later herein some aspects of double jeopardy have probably always been interdicted by the Fourteenth Amendment. Furthermore, both a review of double jeopardy and of the basic policy questions related thereto act as a buttress to the postulate that double jeopardy has always been within Fifth Amendment due process. This inclusion of double jeopardy protection within Fifth Amendment due process has been reflected in many decisions which have established basic federal protections against the jeopardy features inherent in retrials for vertical offenses such as in *Green* and in the relitigation of similar or horizontal offenses such as exist here. Thus, a second trial for an offense which requires the *same* evidence has long been held violative of federal due process.

Blockburger v. *U. S.*, 284 U. S. 299 (1932);

In re Neilson, 131 U. S. 176 (1889);

U. S. v. *Maybury*, 274 F. 2d 899 (2nd Cir. 1960).

Justice Brennan in *Abbate* at 359 U. S. 199 (1959), noted the associated evil inherent in permitting the Government to multiply the number of offenses by statute which resulted from the same act.

The articulation of the Fifth Amendment due process as inclusive of the basic rights of man, including the protection against double jeopardy, has resulted in cogent argument for the proposition that "due process" should not import one thing with reference to the National Government and something entirely different with reference to the States.

See:

Justice Harlan's dissent in *Hurtado* v. *People of California,* 110 U. S. 516, 538 (1884).

Certainly incorporation of the entire Bill of Rights into the Fourteenth Amendment has been urged as a practical realization of this equality of due process application.

II. LIKEWISE THE DOCTRINE OF SELECTIVE INCORPORATION REQUIRES INCLUSION OF THE DOUBLE JEOPARDY PROTECTION OF THE FIFTH AMENDMENT INTO THE FOURTEENTH AMENDMENT.

In the instant action, however, relief to Petitioner is required whether total absorption of the Bill of Rights is accepted or whether continued recognition is given to selective incorporation for the reason that selective incorporation would also bring within the ambit of the Fourteenth Amendment such fundamental right as the protection against multiple jeopardy.

See:

Henkin, *Selective Incorporation,* 73 Yale L. J. 74 (1966).

Although *Palko* denied absorption of a specific facet of double jeopardy within the framework of the Fourteenth Amendment, it, nevertheless, seems clear that federal due process has always accepted *some* aspect of double jeopardy within its constitutional ambit, as applied to the States.

U. S. ex rel. Hetenyi v. *Wilkins,* 348 F. 2d 844 (2d Cir. 1965);

Fisher, *Double Jeopardy, Two Sovereignties and the Intruding Constitution*, 28 U. of Chi. L. Rev. 591, 594 (1961);

Double Jeopardy, The Reprosecution Problem, 77 Harvard L. Rev. 1272 (1964).

In fact, even the late Justice Frankfurter recognized this fact when he stated in *Brock* v. *North Carolina*, 344 US 424 (1953) at page 429 as follows:

> "A state falls short of its obligation when it callously subjects an individual to successive retrials on a charge on which he has been acquitted or prevents a trial from proceeding to a termination in favor of the accused merely in order to allow a prosecutor who has been incompetent or casual or even ineffective to see if he cannot do better a second time."

See:

Dissent of Justice Black in which Justice Douglas joined in *Adamson* v. *California*, 332 U. S. 46, at page 71 (1947).

Petitioner submits that (1) if subjecting a criminal defendant to successive trials for similar or "same evidence" offenses is violative of Fifth Amendment due process, *a fortiori* successful trials for an identical offense would violate federal due process especially when it is coupled at each trial with a second charge alleging substantially the *same thing*, and (2) double jeopardy as applied to state due process under the Fourteenth Amendment can be made effective only by adopting the federal standards and criteria.[2]

[2] Even the doctrine of selective incorporation of those fundamental rights that have already been held to be within the Fourteenth Amendment have carried with it application of federal standards existing under the Bill of Rights. This is illustrated by *Kerr* v. *California*, 374 U. S. 23 (1963), and *Gideon* v. *Wainright*, 372 U. S. 335 (1963).

Miranda v. *Arizona*, — U. S. —, 16 L. Ed. 2d 694 (1966).

To summarize, one would be hard pressed to visualize a case where multiple exposure to criminal penalties for one transaction could be any greater than the one at bar. Petitioner is admittedly subjected to dual counts for offenses which factually and legally are identical. This evil of identical statutory offenses with separate but unequal penalties would alone be of dubious fairness.[3] Coupled with this however, is the fact that after successfully receiving an acquittal of one such offense and a reversal on appeal as to the other, Petitioner is, for the *second* time, subjected to both charges, including that for which he had legally been acquitted. Double jeopardy protection here has become a sterile doctrine.

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[3] At the time of Petitioner's original appeal a survey of the various States and their attempt to deal with the motor vehicle death situation was made and *only* Indiana had created substantively identical offenses which could be joined as multiple counts. The review of the states indicated as follows:

The particular statutory approach to secure convictions in such cases differs among the various jurisdictions. Some states have, by statute, made the new offense a lesser includable one under the general manslaughter act.

Rev. Laws of Hawaii, 1955, Sec. 291-10, Sec. 291-11;

Mich. Stat. Ann. 28.556, 28.557;

Ark. Stat. Ann. 1957 Repl. 75-1001.

This result has been achieved by judicial construction of the statutes existing in several other jurisdictions.

Smith Hurd, Ill. Stat. Ann., Sec. 363, 364(a);

Gen. Stat. Kan., Sec. 8-529, Sec. 21-420;

Ky. Rev. Stat., 435.020, 435.025;

Rev. Stat. Me., 1954, Sec. 151, 151-B;

N. J. Stat. Ann., Sec. 2A, 113-5, 113-9.

In many of these states the degree of culpability necessary for a con-

III. AN ARGUMENT THAT "WAIVER" OR "MOOTNESS" EXISTS IS UNTENABLE.

It is true that *Palko* v. *Conn.*, 302 U. S. 319 (1937) *supra*, denied absorption of the doctrine within the concept of

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viction under the newly created statute is somewhat less than the "recklessness and wantonness" necessary under the manslaughter statute.

The situation seems to be the reverse in South Carolina, where mere negligence is sufficient to convict under the manslaughter statute but recklessness is required under the reckless homicide statute.

Code of Law of S. C., Sec. 16-55, Sec. 46, 341.

Consequently, a defendant cannot be guilty of both.

State v. *Cravers* (1960), 236 S. C. 305, 114 S. E. 2d 401.

Where the new offense is not of lesser degree than manslaughter and thus not includable under the general manslaughter statute, the judicial construction has many times been then an implied repeal of the general manslaughter act, insofar as it pertains to highway deaths was accomplished.

State v. *Davidson*, — Idaho —, 309 P2d 211;
construing Idaho Code Sec. 39-1001;

McKinney's *Consolidated Laws of New York*, 39 Sec. 1053(a);

Opinions of the Attorney General (1936), p. 141.

It might be further noted that many states still use the manslaughter act as the basis of highway death prosecutions and have refused to enact statutes imposing a criminal penalty for some degree of culpability less than recklessness because of some difficulty in obtaining convictions under the general act.

Code of Ala. (1958), Tit. 14, Sec. 320;

Del. Code Ann., Tit. 11, Sec. 575;

Fla. Stat. Ann., Tit. 44, Sec. 782.07;

Ga. Code Ann., Sec. 26-1009;

Iowa Code Ann., Sec. 690.10;

N. Mex. Stat. Ann. (1953), 40-24-7;

Nev. Rev. Stat., Sec. 200.070;

Rev. Code Mont., Sec. 94-2507;

Mass. Gen. Law Ann., Sec. 265.13;

Vernon's Mo. Stat. Ann., Sec. 559.070;

due process when an appeal resulted in a new trial. Although Petitioner earnestly contends *Palko* to be incompatible with *Mapp* v. *Ohio*, 376 U. S. 643 (1961), *Gideon* v. *Wainright*, 372 U. S. 335 (1963), *Malloy* v. *Hogan*, 378 U. S. 1 (1964) and *Pointer* v. *Texas*, 380 U. S. 400 (1965) it may be worthy to note that here it is not only a waiver by appeal such as *Palko* but also the evil of multiple offenses for the same act to which this Petitioner was subjected. Thus, to deny relief here is not only to run afoul of *Mapp*, *Gideon*, *Malloy* and *Pointer* but to extend the waiver doctrine beyond the framework of *Palko* itself.

In this case there is no question as to Petitioner being twice placed in jeopardy. In fact, Respondent places its entire argument on the waiver theory which was rejected in *Green* and on a "mootness" argument which is unsupportable both conceptually and factually. Both of these assertions were before the Circuit Court of Appeals in *United States ex rel. Hentenyi* v. *Wilkins*, 348 F. 2d 844 (2nd Cir. 1966) *supra*. There the Defendant in a State Court had been tried for first degree murder and convicted of second degree murder, an includable offense. His successful appeal resulted in his being retried (and convicted) for first degree murder (directly contrary to the holding in *Green*). A successful appeal of this conviction resulted in a third trial for first degree murder and this time a con-

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Miss. Code Ann., Sec. 2232;
N. Dak. Rev. Code, Sec. 17-716;
Purdon's Pa. Stat. Ann., Sec. 18-4702;
S. Dak. Code, 13.2016;
Tenn. Code, Sec. 391a406.

In Oregon, the statute itself specifically provides that the manslaughter act is not applicable to highway cases.

Ore. Rev. Stat., Sec. 163.040 and 163.091.

viction of second degree murder. That Court discusses the various rationale regarding absorption of the jeopardy concept and equally significant the concepts of waiver and mootness. Its persuasive language at 348 F. 2d 859 is as follows:

> "It is difficult to understand how the fundamental unfairness inherent in allowing prosecutor to "do better a second time" (Mr. Justice Frankfurter, concurring in Brock v. North Carolina, supra, 344 U. S. at 429, 73 S. Ct. at 351) is mitigated by conditioning this second chance on a successful appeal by the accused. To suggest that the accused, by appealing the conviction, somehow "agreed" to subject himself to the reprosecution on the greater charge if the conviction for the lesser charge is reversed, thereby rendering such a reprosecution fair, cf. People v. Palmer, supra, is to ignore the elementary psychological realities of the situation, see, Kepner v. United States, supra, 195 U.S. at 135, 24 S. Ct. 797 (Holmes, J., dissenting), Green v. United States, supra, 355 U.S. at 192, 78 S. Ct. 221 and to presume, quite inconsistently with the evolution of our communal values, that a barter theory of fairness operates with no less force in the halls of justice than it does in the market place, see generally, Fay v. Noia, 372 U. S. 391, 83 S. Ct. 322, 9 L. Ed. 2d 837 (1963)."

That Court concerned itself also with the contention that no prejudice (or a "moot" question as it is called here) exists because the Defendant ended his series of trials without conviction on the first degree murder charge. (Similarly Petitioner at this juncture has, as yet, not been convicted of involuntary manslaughter.) Its rejection of that contention is as follows at 348 F. 2d 844, 864, 865:

> "The question is not whether the accused was actually prejudiced, whether there is *reasonable possibility* that he was prejudiced . . . The ends of justice would not be

served by requiring a factual determination that the accused was actually prejudiced in his third trial by being prosecuted for and charged with first degree murder, nor would the ends of justice be served by insisting upon a quantitative measurement of that prejudice. The energies and resources consumed by such injury would be staggering and the attainable level of certainty most unsatisfactory. There could never be any certainty as to whether the jury was actually influenced by the unconstitutionally broad scope of the reprosecution or whether the accused's defense strategy was impaired by this scope of the charge, even if there were a most sensitive examination of the entire trial record and a more suspect and controversial inquest of the jurors still alive and available. . . . The mere fact that the accused is in custody for second degree murder, the only reason offered by the District Court to justify its conclusion that "the procedure complained of has not resulted in any hardship to relator," is not sufficient to exclude this possibility, or to make it less than reasonable . . . .

"Moreover, in this instance, and on the elementary facts established—that the indictment of the third trial charged first degree murder, that the prosecution focused on obtaining a conviction on that charge, and that the jury was given the alternative of finding him guilty of that charge—we hold that there would be no rational basis for concluding that it is not reasonably possible that the accused was prejudiced by the unconstitutionally broad scope of the prosecution."

Similarly Respondent's argument of "mootness" or "no prejudice" is untenable here. Certainly the protection against double jeopardy is not confined to the verdict or judgment. Rather it is the "jeopardy" of such verdict or judgment by the subjugation of one to successive trials that is at the heart of the protection. Furthermore, the "harm" inherent in permitting either successive counts for

the same offense or successive trials for a previously adjudicated offense, or *both* affords prosecution leverage and compromising jury possibilities of a most prejudicial nature. In any event this Court has quite recently repudiated the relevancy of such a lack of prejudice argument *even had it existed.* Thus in *Brookhart* v. *Janis,* — U. S. —, 86 S. Ct. 1245 (1966) this Court said,

> "In this Court respondent admits that:
>
> 'If there was here a denial of cross-examination without waiver, it would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' This concession is properly made."

No basis, logical or historical, could justify isolation of doube jeopardy guarantees from the confines of due process which include such allied protections as self-incrimination, search and seizure, right to counsel, and confrontation of witnesses. It is equally arguable that double jeopardy, especially when coupled with the creation of multiple offenses of identical nature, is basically unfair (independent of the specific jeopardy provision of Fifth Amendment) under a system which guarantees due process of law. The fact that the guarantee against double jeopardy is inherent in our system of due process as a part of fundamental fairness and justice, even in spite of and apart from *Palko* has received very recent judicial recognition.

Norkett v. *Stallinger,* 251 F. Supp. 662 (E.D.N.C. 1966);

People v. *Ressler,* 17 N. Y. 2d 174, 216 N. E. 2d 582 (1966).

Green now firmly establishes the principle that a criminal defendant may not constitutionally be tried on a greater

charge after having been once in jeopardy on that charge in a trial which resulted in a conviction for a lesser charge. This, too, is of the essence of due process. The fact that in this case the retrial was on two separate counts alleging the same substantive offense rather than in two vertical counts alleging includable offenses certainly does not tend to mitigate the significance of *Green*. Actualy the result in *Green* again becomes *a fortiori* here.

IV. CONCLUSION

A review of the doctrine of double jeopardy in the context of our constitutional law leads logically and inescapably to the necessity of at least partial absorption of its commands within the Fourteenth Amendment guarantees. The importance of the doctrine and its significance as a right entitled to federal protection, actually calls for adoption of universal, federal standards of double jeopardy and the protection of such from state encroachment.

See:

Sigler, *Federal Double Jeopardy Policy*, 19 Vand. L. R. 375 (1966);

Fisher, *Double Jeopardy and Federalism*, 50 Minn. L. R. 607 (1966).

The ideology of *Palko* is repugnant to this concept, and, as in other civil liberty cases, it must yield if we are to give meaning to the individual protections so important in our democracy.

Double jeopardy actually presents, in a sense, the totality of many protections and, as such, is of equal if not greater stature. The right to be free from certain repulsive aspects of a criminal trial such as, self incrimination, unreasonable search and seizure, inability to cross-examine

witnesses, and even the right to counsel; become largely academic if a defendant may be subjected to successive retrials regardless of how protective each particular trial may be. Inclusion of these segments of a criminal trial as a part of due process thus requires similar inclusion for the totality of the trial and the finality of its determination. Double jeopardy is a fundamental concept in ordered liberty. This cause should be reversed.

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